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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205896
Party	Defendant Wild Brain Entertainment, Inc.
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Date	10/11/2013
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 85/509929
For the Trademark/Service Mark DIZZY
Application Filed on January 5, 2012/Published on June 5, 2012

BEAU L. TARDY,)	
)	
Opposer)	
)	
v.)	
)	Opposition No. 91205896
WILD BRAIN ENTERTAINMENT, INC.,)	
)	
Applicant)	
_____)	

ANSWER

In response to the Amended Notice of Opposition filed by Beau L. Tardy ("Opposer"), Wild Brain Entertainment, Inc. ("Applicant") files this Answer.

To the extent that any allegations are asserted in the preamble or the concluding paragraph, Applicant denies each and every allegation.

1. Standing: DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 1 of the Amended Notice of Opposition.

2. Applicant admits that, among other things, it produces cartoon characters for entertainment purposes and related merchandise and that it develops television, motion pictures, short-form programming, commercial content and consumer products. Applicant denies that it is one of the world's foremost producers of animation. For clarity, Applicant notes that it is an owner of GabbaCaDabra LLC, a Delaware limited liability company that produces the acclaimed

children's television series and live touring show *Yo Gabba Gabba!*, that Applicant is a subsidiary of DHX Media, Ltd., a Canadian company, and that DHX Media, Ltd. is one of the world's foremost producers of animation and a leading global children's entertainment company. Applicant denies that its webpage at www.wildbrain.com states that it: "Provides animation for commercials, TV series, feature films and other media." Applicant is without knowledge or information sufficient to form a belief and therefore denies the remaining allegations of Paragraph 2 of the Amended Notice of Opposition.

3. Additional Standing: Applicant admits that, based upon the TSDR records of the USPTO, on September 28, 2012, after filing the original Notice of Opposition, Opposer filed Application Serial No. 85741800 for the trademark DIZZY for the following goods in IC 9: *Digital materials, namely, CDs featuring television programs, cartoons, music in the field of entertainment; Digital media, namely, pre-recorded video cassettes, digital video discs, digital versatile discs, downloadable audio and video recordings, DVDs, and high definition digital discs featuring animation; Digital media, namely, DVDs, downloadable audio and video recordings, downloadable files featuring television programs, cartoons, music in the field of entertainment; Downloadable videos and downloadable audio visual recordings featuring television programs, cartoons, music in the field of entertainment via the internet and wireless devices; Prerecorded digital video disks featuring television programs, cartoons, music in the field of entertainment; Prerecorded video cassettes featuring television programs, cartoons, music in the field of entertainment.* Applicant admits that, based upon the TSDR records of the USPTO, Opposer claims to have a date of first use and first use in commerce of December 31, 1996 for the above IC 9 goods, and claims that his DIZZY trademark was in use for all of the above IC 9 goods as of September 28, 2012, the application filing date. Applicant is without

knowledge or information sufficient to form a belief as to the truth of and therefore denies Opposer's claims regarding his first use, first use in commerce, and current use of the DIZZY trademark on the above IC 9 goods. Applicant admits that Opposer's application is reasonably expected to be refused registration due to a likelihood of confusion with the Application that is the subject of this Opposition; however, Applicant denies that this expected refusal provides Opposer with any additional standing, noting that Opposer's standing in this Proceeding is based solely on Opposer's common law rights, if any, in the DIZZY trademark.

4. Opposer's Priority: DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 4 of the Amended Notice of Opposition.

5. Opposer's Ownership: DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 5 of the Amended Notice of Opposition.

6. Applicant admits that its priority date for the goods set forth in the Application that is the subject of this Opposition is January 5, 2012, the filing date of its intent-to-use application. Applicant is without knowledge or information sufficient to form a belief and therefore denies the remaining allegations of Paragraph 6 of the Amended Notice of Opposition.

7. Opposer's Mark is Protectable: DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 7 of the Amended Notice of Opposition.

8. DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 8 of the Amended Notice of Opposition.

9. DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 9 of the Amended Notice of Opposition.

10. Applicant: Applicant admits that its Application that is the subject of this Opposition is an intent-to-use application for the word mark DIZZY for the following goods in IC 9: *Electrical and scientific apparatus, namely, electronic game software; computer game software; downloadable computer games; computer and video-game cassettes, cartridges, discs and programs; downloadable game software; motion picture films featuring music, animated cartoons, live-action performances and live action performances by costumed characters all in the field of children's education; pre-recorded video and audio cassettes, video and audio tapes, video and audio discs, CD ROMs, compact discs, digital versatile discs, musical video recordings, musical sound recordings and phonograph records featuring music, animated cartoons, live-action performances and live action performances by costumed characters all in the field of children's education; software and manuals sold as a unit in the field of children's education, namely, for use in creating, updating and maintaining calendars, for information management and for use as computer screen savers; decorative refrigerator magnets; hand held units for playing electronic games for use with external display screen or monitor.* However, Applicant denies that it is attempting to register the DIZZY word mark for the above IC 9 goods, which will only occur once Applicant files an Allegation of Use for the goods on which it actually has used the mark.

11. Lack of Bona Fide Intent-to-Use Grounds: DENIED.

12. DENIED.

13. DENIED.

14. DENIED.

15. DENIED.

16. DENIED.

17. DENIED.

18. DENIED.

19. DENIED.

20. Likelihood of Confusion Grounds: Applicant admits that, based upon the TSDR records of the USPTO, Applicant's mark as set forth in the Application that is the subject of this Opposition is identical to the mark set forth in Opposer's Application Serial No. 85741800. However, Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies that Opposer has rights in or to any DIZZY word mark.

21. Applicant admits that both Applicant and Opposer seek to register the word mark DIZZY. However, based on information and belief, Applicant denies that how Applicant's character and Opposer's character look is immaterial, because how the characters look, what attributes they may have, and what creative works they appear in will impact other "likelihood of confusion" factors such as different consumers and channels of trade. Applicant notes that its DIZZY character appears in educational programs for children and that its merchandise is largely expected to be on goods and services for use by children. Also, based on information and belief, Applicant asserts that there are other DIZZY characters that look different from Applicant's character and Opposer's character and are owned by third parties, without any likelihood of confusion.

22. Inevitable confusion will result from Applicant's use of DIZZY as a mark:
DENIED.

23. Applicant admits that its DIZZY word mark and Opposer's DIZZY word mark, if any, as set forth in their respective trademark applications, are identical. However, Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies that Opposer has rights in or to any DIZZY mark.

24. Applicant admits that its DIZZY word mark and Opposer's DIZZY word mark, if any, as set forth in their respective trademark applications, sound identical. However, Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies that Opposer has rights in or to any DIZZY mark.

25. DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies that Opposer is currently offering any goods whatsoever bearing the DIZZY word mark, and therefore denies the allegations set forth in Paragraph 25 of the Amended Notice of Opposition. Applicant notes that parties' goods may not be identical or highly similar if there is no likelihood of confusion, for example, if they are designed for and offered to different consumers in different channels of trade. Applicant does not know what "[t]he parties' goods...have an identical connotation" means, and therefore denies it.

26. Applicant admits that neither party's description of goods, as set forth in their respective applications, have restrictions as to the intended channels of trade.

27. DENIED. Applicant is without knowledge or information sufficient to form a belief as to the truth of and therefore denies the allegations of Paragraph 27 of the Amended Notice of Opposition. Applicant notes that this Proceeding, which concerns goods in IC 9, does not involve services offered by either of the parties, so this assertion is not relevant to this Proceeding.

28. DENIED.

29. DENIED.

30. As a theoretical matter, Applicant admits that the public interest is the dominant interest and served by removing marks that cause inevitable confusion from the register, but asserts that this principle is not applicable to this Proceeding.

AFFIRMATIVE DEFENSES

31. No Standing: Based on Applicant's knowledge and belief, Opposer lacks standing to file this Opposition because Opposer is not the owner of and does not have a real interest in any DIZZY mark or any other mark likely to be confused with Applicant's DIZZY mark.

32. Abandonment: Based on Applicant's knowledge and belief, Opposer abandoned the DIZZY mark by ceasing to use the DIZZY mark on or in connection with any goods or services whatsoever for a period of three (3) years or more.

33. No Use In IC 9: Based on Applicant's knowledge and belief, Opposer has not used the term DIZZY as a trademark on any IC 9 goods whatsoever.

34. Abandonment In IC 9: Based on Applicant's knowledge and belief, Opposer abandoned the DIZZY mark by ceasing to use the DIZZY mark on or in connection with any IC 9 goods whatsoever for a period of three (3) years or more.

35. No Trademark Rights In IC 9: Based on Applicant's knowledge and belief, Opposer did not use the term DIZZY as a trademark on or in connection with any IC 9 goods whatsoever for a period of five (5) years or more prior to September 2012, when Opposer hired counsel and filed his Application Serial No. 85741800.

36. No Trademark Rights: Based on Applicant's knowledge and belief, Opposer did not use the term DIZZY as a trademark on or in connection with any goods or services

whatsoever for a period of five (5) years or more prior to September 2012, when Opposer hired counsel and filed his Application Serial No. 85741800.

37. No Likelihood Of Confusion With IC 9 Goods: There is no likelihood of confusion between Applicant's current or intended use of the DIZZY mark for game software, motion picture films, video and audio media, CD ROMs, DVDs and other goods in IC 9 and the IC 9 goods set forth in Opposer's Application Serial No. 85741800.

38. No Likelihood Of Confusion With IC 35 Services: There is no likelihood of confusion between Applicant's current or intended use of the DIZZY mark for game software, motion picture films, video and audio media, CD ROMs, DVDs and other goods in IC 9 and the production of television commercials in IC 35. The only registration (now cancelled) for the DIZZY mark that Opposer claims to own, which Applicant denies, was for the production of television commercials in IC 35.

39. No Likelihood Of Confusion With Any Goods or Services: Based on information and belief, there is no likelihood of confusion between Applicant's current or intended use of the DIZZY mark for game software, motion picture films, video and audio media, CD ROMs, DVDs and other goods in IC 9 and Opposer's claimed IC 9 goods, his claimed use for the "[p]roduction of television commercials, television programs, cartoons, animation, games, screensavers and other forms of entertainment," or for any other goods or services claimed by Opposer.

40. Identical Marks In Identical International Classes Can Coexist On The Principal Register: Applicant notes that conditions in the marketplace can result in no likelihood of confusion, even between identical marks in identical International Classes. The differences between Applicant's IC 9 goods and the IC 9 goods set forth in Opposer's Application Serial No. 85741800 and their target markets, as well as how the goods will be encountered in the

marketplace, mean that there is no likelihood of confusion between Applicant's Mark and the IC 9 goods set forth in Opposer's Application Serial No. 85741800. A likelihood of confusion does not exist due to the mere fact that the goods might potentially be vaguely similar or overlap. See e.g., In re Mars, Inc., 741 F.2d 395, 222 U.S.P.Q. 938 (Fed. Cir. 1984) (use of **CANYON** for candy bars not likely to cause confusion with registered mark **CANYON** for fresh citrus fruit). "Even marks which are identical in sound and/or appearance may create sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion." TMEP §1207.01(b)(i), see e.g., In re Sears Roebuck and Co., 2 U.S.P.Q. 2d 1312 (T.T.A.B. 1987) (**CROSS-OVER** for bras held not likely to be confused with **CROSSOVER** for ladies' sportswear); In re British Bulldog, Ltd., 224 U.S.P.Q. 854 (T.T.A.B. 1984) (**PLAYERS** for men's underwear held not likely to be confused with **PLAYERS** for shoes); In re Sydel Lingerie Co. Inc., 197 U.S.P.Q. 629 (T.T.A.B. 1977) (**BOTTOMS UP** for ladies' and children's underwear held not likely to be confused with **BOTTOMS UP** for men's clothing).

41. Applicant Is At Least Entitled To A Restricted Registration: Applicant's DIZZY mark is based on the name of a character appearing in a web-based children's educational programseries, and this application is for related merchandise in IC 9. Applicant is at least entitled to a registration in IC 9 restricted to the field of character merchandise/children's entertainment.

42. Failure To State A Claim: Opposer's Amended Notice of Opposition fails to state a claim upon which relief may be granted.

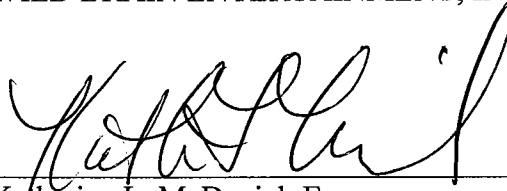
WHEREFORE, Applicant, having fully answered Opposer's Amended Notice of Opposition, and setting forth its affirmative defenses, prays that the Amended Notice of Opposition be dismissed and the Certificate of Registration for Applicant's Mark be issued.

Respectfully submitted,

Date: October 11, 2013

WILD BRAIN ENTERTAINMENT, INC.

By: _____


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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES) ss:

I, Adam Stocks, am employed in the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 6060 Center Drive, Tenth Floor, Los Angeles, California 90045.

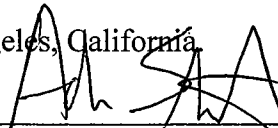
On October 11, 2013, I caused the foregoing document described as: **ANSWER**, to be served on the parties in this action at the following address via First Class U.S. Mail, postage prepaid:

Wendy Peterson, Esq.
Not Just Patents LLC
PO Box 18716
Minneapolis, MN 55418

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on that same day, with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

I declare that I am employed in the office of a member of the bar at whose direction the service was made.

Executed on **October 11**, 2013, at Los Angeles, California.



Adam Stocks